

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**JERSEY SHORE UNIVERSITY MEDICAL
CENTER, HACKENSACK MERIDIAN
HEALTH**

Respondent,

and

**HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES, AFT/AFL-CIO**

Petitioner.

Case Nos. 22-RC-263932 and
22-RC-263999

**PETITIONER’S STATEMENT IN RESPONSE TO RESPONDENT’S REQUEST FOR
REVIEW OF THE REGIONAL DIRECTOR’S ORDER DIRECTING A MAIL BALLOT
ELECTION**

Petitioner Health Professionals and Allied Employees, AFT/AFL-CIO (“HPAE”) submits this Statement, pursuant to Section 102.67(f) of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations. Petitioner opposes the Respondent’s Request for Review of the Regional Director’s (“RD”) Decision and Direction of Election and supports the Regional Director’s Order directing a mail ballot election. Petitioner opposes the Request for Review for the following reasons:

1. The Regional Director did not misrepresent the current New Jersey Executive Orders on the state of the pandemic in New Jersey. Respondent claims that the RD ignored the most recent Executive Order No. 180 issued on August 26, 2020, and that this most recent EO more accurately reflects the state of the pandemic in New Jersey. While the

RD did not cite EO 180 in his Decision and Direction of Election, Respondent misrepresents the contents of EO 180. In its brief, Respondent cites that portion of EO 180 wherein the Governor acknowledges that because of the unprecedented emergency measures taken by the State, there has been a decrease since April in the rate of reported COVID-19 cases. (Respondent's Brief at p. 14). While this is good news for the State and its citizens, Respondent fails to note that EO 180 also reiterates that "there still exists a public health emergency" in the State, a position that the State of New Jersey has maintained since the start of the pandemic in New Jersey. The RD was not incorrect or mistaken to note that since the beginning of the pandemic, in each Executive Order, the Governor has renewed his declaration that a state of emergency still exists. (Executive Order 180). Indeed, EO 180 states that "the fact that the spread of COVID-19 has been limited by the State's emergency measures *does not in any way suggest that the ongoing Public Health Emergency has dissipated*, because absent social distancing measures, public health experts anticipate that the spread of COVID-19 would again significantly increase." (EO 180). Moreover, EO 180 warns that by renewing the declaration of public health emergency throughout the State, the State would be able to enact stricter measures if the rate of COVID-19 infections increases once more, "as we are seeing in numerous states across the country." Contrary to the Respondent's position, EO 180 acknowledges that New Jersey is not out of danger and that the possibility of a "second wave" of COVID-19 infections is a real threat.

2. The Regional Director did not erroneously interpret COVID data, as Respondent argues. (Respondent's Brief at p. 15). The RD asserted that while the overall rate of COVID infections has decreased in the County and in the State, the rate of transmission

in Monmouth County “continues to fluctuate dangerously.” Respondent argues that this statement is speculative and unsupported. Respondent is incorrect. The RD supports this statement by citing the most recent COVID information for Monmouth County, released on September 11, 2020. That data, retrieved from the website covidactnow.org (a website relied upon by the Respondent at the hearing), notes that “the total number of COVID cases in Monmouth County, New Jersey is growing at an unsustainable rate. If this trend continues, the hospital system may become overloaded. Caution is warranted.” (Decision and Direction of Election, at p. 3). That same website warns that “Monmouth County is at risk of an outbreak. COVID cases are either increasing at a rate likely to overwhelm hospitals.”¹ Contrary to Respondent’s argument, the RD assessed and relied upon the most current data available to conclude that the risk of transmission in Monmouth County has been rising. Moreover, the Employer is and continues to be directly affected by the pandemic. There were active COVID-19 cases at the JSUMC as of the date of hearing. While the Employer attempts to minimize the presence of COVID-19 at the hospital by suggesting that the positive test ratios are low (Employer’s Brief, at p. 8), the RD acknowledges the Employer’s data, and, at the same time, concludes that it would be “highly impractical to attempt to create laboratory conditions for 1200 voters while social distancing in a facility where COVID-19 is present.” (Decision and Direction of Election, at p. 8). The RD did not ignore or misinterpret COVID-16 data, but rather relied upon the data and facts

¹ https://covidactnow.org/us/nj/county/monmouth_county?s=1075235 (Last viewed on September 25, 2020).

supplied in part by the Respondent to support the decision for a mail ballot election. In this regard, the RD did not abuse his discretion.

3. The RD did not misapply or misinterpret Board precedent regarding the application of the “extraordinary circumstances” standard. Significantly, the RD considered and analyzed all of the the specific factual circumstances of the petitioned-for unit, which includes the employees scattered schedules, the potential disenfranchisement of voters, the presence of COVID-19 at the facility, the rates of infection and presence of the virus in New Jersey and Monmouth County, and the proposed manual voting plan presented by the Respondent. All of these factors contributed to the RD’s conclusion that extraordinary circumstances existed, and thus it cannot be said that the RD misinterpreted the law or erroneously applied Board precedent.
4. The RD did not “arbitrarily preclude” JSUMC from presenting witnesses regarding the type of election for the petitioned-for unit. The Respondent argues that the RD should have permitted it to present testimony from a medical expert regarding COVID-19 and from its Director of Operations and Risk Management regarding its proposed election procedures. The RD’s decision on the special appeal was not arbitrary. The Board’s Rules state that prior to the close of the hearing, the Hearing Officer shall solicit the parties’ positions on the type, date, times and locations of the election, but that the Hearing Officer “shall not permit litigation of those issues.” Board Rule 102.66(g)(1). This rule is unequivocal in that neither the Hearing Officer nor the RD have discretion to permit litigation on the issue of the type of election to be held. The RD’s decision to preclude witness testimony on the type of election is supported by the Board rules and thus cannot be viewed as arbitrary.

5. The RD fully considered all elements of the Respondent's proposed manual election plan. The RD analyzed all elements of the proposed manual election plan, and identified the limitations and drawbacks of the proposed protocols. The RD noted that the nature of the work of the Board agent at the election would not allow for social distancing; that the space proposed in which to conduct the election was insufficient to allow for observers, board agents, voters, and interpreters to maintain social distance; that given the size of the voting unit, delays in moving through the voting process and bottlenecks in the voting area would likely occur, thus undermining social distancing measures; that the board agents would not be able to sufficiently monitor non-electioneering rules; and that the necessarily long hours and multiple days of election would expose the board agents and observers to conditions they would not normally experience and potentially increase their risk of infection. The RD was not dismissive of the details of the proposed election plan. To the contrary, the RD addressed all elements of the proposed plan – the location, the times, as well as the social distancing and other proposed safety protocols. While the Respondent disagrees with the analysis, the RD did not abuse his discretion in his analysis and ultimate rejection of the proposed plan.

For all of these reasons, HPAE opposes the Respondent's Request for Review.

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CERTIFICATE OF SERVICE

I hereby certify that the Petitioner's Statement in Opposition to Respondent's Request for Review was forwarded via email to the following:

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Dated: September 25, 2020

/s/ Annmarie Pinarski
Annmarie Pinarski, Esq.